

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

Report on the Safe Nurse Staffing Levels (Wales) Bill

May 2015

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership:



David Melding (Chair)
Welsh Conservatives
South Wales Central



Alun Davies
Welsh Labour
Blaenau Gwent



Suzy Davies
Welsh Conservatives
South Wales West



William Powell
Welsh Liberal Democrats
Mid and West Wales



Simon Thomas
Plaid Cymru
Mid and West Wales



Contents

The Committee's Recommendations	5
1. Introduction	6
The Committee's remit	6
Introduction and consideration of the Bill.....	6
2. Background	7
Purpose of the Bill	7
3. Legislative Competence	8
Explanatory Memorandum	8
Evidence from the Member in charge	8
Our view	8
4. General observations	9
Evidence from the Minister	9
Evidence from the Member in Charge.....	9
Our view	10
5. Powers to make subordinate legislation and issue guidance – observations on specific powers	11
Background	11
Section 2 – Safe nurse staffing levels.....	11
Section 10A(3) of the 2006 Act	11
Evidence from the Minister	11
Evidence from the Member in charge	11
Our view	12
Sections 10A(4)-(6) of the 2006 Act.....	12
Evidence from the Minister	12
Evidence from the Member in charge	12
Our view	13
The use of definitions in the Bill.....	13
Evidence from the Minister	13

Evidence from the Member in charge	14
Our view	15
Section 4 - Commencement.....	15
Our view	16

The Committee's Recommendations

Recommendation 1. We recommend that the Member in charge tables amendments to the Bill to deliver the objectives of section 10A(4)-(6) of the National Health Service (Wales) Act 2006 through regulations subject to the negative procedure. (Page 13)

Recommendation 2. We recommend that the Bill is strengthened by the Member in charge by placing more definitions on the face of the Bill. (Page 15)

Recommendation 3. We recommend that the Member in charge considers the clarity of this provision and brings forward amendments if necessary. (Page 16)

Recommendation 4. We recommend that a commencement power is included in the Bill. (Page 16)

1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Introduction and consideration of the Bill

4. On 1 December 2014, Kirsty Williams AM introduced the Safe Nurse Staffing Levels (Wales) Bill (‘the Bill’) and accompanying Explanatory Memorandum.¹
5. The Assembly’s Business Committee referred the Bill to the Health and Social Care Committee for consideration setting a deadline of 10 April 2015 to report on the Bill’s general principles. At the request of the Health and Social Care Committee, the Business Committee agreed to extend the deadline to 8 May 2015.
6. We considered the Bill at our meeting on 2 February 2015, taking evidence from the Member in charge, Kirsty Williams AM and the Minister for Health and Social Services, Mark Drakeford AM (‘the Minister’).

¹ Kirsty Williams AM, *Safe Nurse Staffing Levels (Wales) Bill, Explanatory Memorandum*, December 2014.

2. Background

Purpose of the Bill

7. The Explanatory Memorandum states that:

“The Bill seeks to ensure that nurse staffing levels within the Welsh NHS are sufficient to provide safe, effective and quality nursing care to patients at all times.”²

8. It states that the Bill will strengthen existing arrangements by:

- placing a duty on health service bodies in Wales to have regard to the importance of ensuring an appropriate level of nurse staffing wherever NHS nursing care is provided;
- for adult acute hospital wards, requiring the Welsh Government to issue guidance setting out the methods/processes by which NHS organisations will be expected to determine nurse staffing levels that are locally appropriate and at all times safe;
- placing a duty on health service bodies to take steps to ensure that nurse staffing levels on adult acute wards do not fall below certain levels. These ‘minimum’ levels are to be included in the statutory guidance as minimum ‘nurse to patient’ ratios and ‘nurse to healthcare support worker’ ratios. There is provision for this duty to be extended to other healthcare settings at a future date;
- ensuring that, when determining nurse staffing levels, certain roles (ward sisters for example) are regarded as supernumerary, and factor such as staff training and development needs and planned/unplanned leave are properly taken into account;
- placing a duty on health service bodies in Wales to monitor their compliance with the safe nurse staffing requirements and to take action where failings occur;
- providing a statutory basis for patients and staff to challenge poor levels of nurse staffing.³

² Explanatory Memorandum, paragraph 3.

³ Explanatory Memorandum, paragraph 3

3. Legislative Competence

Explanatory Memorandum

9. The Explanatory Memorandum indicates that the Assembly has competence to make this legislation by virtue of paragraph 9 (Health and health services) of Part 1 of Schedule 7 of the Government of Wales Act 2006.

10. The Explanatory Memorandum notes that regulation of healthcare professionals is listed as an exception in paragraph 9, but that none of the provisions in the Bill fall within that or any other exception.⁴

Evidence from the Member in charge

11. Kirsty Williams AM told us that she believes the Bill to be within the Assembly's competence. She highlighted that there was no mechanism for backbench Members to have discussions with the UK Government on issues of legislative competence.⁵

Our view

12. We note the Member's view regarding the Assembly's ability to make this legislation.

13. As we have previously reported in relation to other Bills, there would appear to be a lack of clarity around the mechanism by which a backbench Member in charge of a Bill should seek the views of the UK Government on matters of legislative competence, should that be necessary. This has also been highlighted to us during our inquiry into making laws in the Fourth Assembly.

⁴ Explanatory Memorandum, paragraphs 7-8

⁵ Constitutional and Legislative Affairs ("CLA") Committee, 2 February 2015 [76] 2 February 2015

4. General observations

Evidence from the Minister

14. The Minister told us that the Welsh Government supported the aim of the Bill, namely to ensure the right number of nurses on hospital wards. However, he stated that legislation may not be the only way to achieve this aim:

“I think it is arguable that a great deal of what the Bill seeks to achieve could be achieved through other tools and levers that the Government could deploy for this purpose. But I’m open minded about the possibility that the Bill could add to that repertoire and strengthen it, and will be hoping to engage constructively with the process as it develops to take a view on that.”⁶

15. He said that the Government would not support the Bill as it is currently drafted, but that the consideration of the Bill has helped the Government think about using the powers it currently has, which could include making the current guidance mandatory.⁷

Evidence from the Member in Charge

16. In her evidence, Kirsty Williams AM made it clear that she felt that there was a need for a legislative approach to meet the aims of the Bill. She highlighted that Local Health Boards (‘LHBs’) do not currently comply with the guidance issued by the Chief Nursing Officer on staffing levels. She said the only way of ensuring compliance was to create a statutory basis on which health boards have to implement the guidance issued by the Welsh Government.⁸

17. She told us:

“It seems to me that only by making it statutory and having this legal underpinning will LHBs prioritise this piece of work....we know that what health managers prioritise are the statutory requirements.”⁹

⁶ CLA Committee, RoP [5] 2 February 2015

⁷ CLA Committee, RoP [8 and 14], 2 February 2015

⁸ CLA Committee, RoP [74], 2 February 2015

⁹ CLA Committee, RoP [86], 2 February 2015

18. She added that the Bill would also give staff and patients a legal basis on which they could challenge healthcare bodies if they felt that staffing levels were unsafe.¹⁰

Our view

19. We acknowledge that the Bill has been brought forward by the Member in charge because existing policies are not, in her view, delivering the outcomes intended and a legislative approach may lead to this issue being given a higher priority. As we have said in reporting on other Members' Bills, this is a perfectly legitimate approach.

20. We do not believe that the Bill, as currently drafted, best addresses the issues it seeks to resolve. This is because a number of key terms are not defined in the Bill (or through regulations) and because statutory guidance, which is the focus of the Bill, is the weakest legislative tool available to the Assembly. We would like to draw our observations to the Assembly's attention and believe that they should be considered in more detail by the Member in Charge and Welsh Ministers during Stage 2 proceedings. Addressing these issues would help strengthen the Bill.

¹⁰ CLA Committee, RoP [86] 2 February 2015

5. Powers to make subordinate legislation and issue guidance – observations on specific powers

Background

21. The Bill has five sections and no schedules.

22. The Bill contains a single power to make regulations and extensive powers to issue guidance.

Section 2 – Safe nurse staffing levels

23. The significant provisions of the Bill are contained in section 2 of the Bill. This section would insert a new section 10A (Duty to maintain safe nurse staffing levels) into the *National Health Service (Wales) Act 2006* (“the 2006 Act”).

Section 10A(3) of the 2006 Act

24. Section 10A(3) of the 2006 Act would confer a power on the Welsh Ministers to extend the duty (contained in section 10(1)(b)) to take all reasonable steps to meet minimum staffing ratios in additional settings i.e. beyond adult inpatient wards in acute hospitals. These regulations would be made by way of the affirmative procedure.

Evidence from the Minister

25. The Minister said that the affirmative procedure was right for the regulations, and that this power would “allow Governments flexibility to bring forward other settings in the future, should the evidence be there to support it”.¹¹

Evidence from the Member in charge

26. Kirsty Williams AM explained that she hoped she had “future-proofed” the legislation by enabling the Welsh Ministers to introduce guidance in other settings if, and when the evidence was available.¹²

27. She told us that if organisations such as NICE brought forward guidance on staffing levels in other healthcare settings, and the Welsh Ministers did not then use this power that:

¹¹ CLA Committee, RoP [57] 2 February 2015

¹² CLA Committee, RoP [100] 2 February 2015

“would be a matter for Ministers to explain to the Chamber and the people of Wales, as to why, or why not, they didn’t feel it appropriate to bring forward guidance at that time.”¹³

Our view

28. We welcome the fact that the Member in charge and the Minister both agree that these Regulations should be made via the affirmative procedure.

Sections 10A(4)-(6) of the 2006 Act

29. The proposed section 10A(4) contains very extensive duties for the Welsh Ministers to give guidance to health service bodies about compliance with the duty under subsection (1)(b). The matters to be dealt with are set out in detail in subsections (5) and (6).

Evidence from the Minister

30. The Minister was of the view that the approach in the Bill to guidance was right, but the details were “over-prescriptive”.¹⁴ He felt that subsection (5) was illustrative of the types of issues guidance may cover, but that it shouldn’t insist that it does.¹⁵

31. Instead, the Minister believed that the Bill should outline the requirements for guidance, and that the detail of the guidance should be drafted following consultation and “the actions that would flow from that.”¹⁶

32. He told us:

“I understand the spirit behind that clause, but, as currently framed, as an absolute must, I think it would end up making difficulties rather than solving them in the way that I’m sure the guidance was designed to do.”¹⁷

Evidence from the Member in charge

33. Kirsty Williams AM explained that in drafting the Bill, she had tried to ensure a balance between flexibility and making clear certain

¹³ CLA Committee, RoP [121] 2 February 2015

¹⁴ CLA Committee, RoP [21] 2 February 2015

¹⁵ CLA Committee, RoP [23] 2 February 2015

¹⁶ CLA Committee, RoP [23] 2 February 2015

¹⁷ CLA Committee, RoP [23] 2 February 2015

expectations of the Minister. She explained this was why the nurse:patient ratios are not on the face of the Bill, but that subsection (5) is specific about areas the guidance should cover. She stated that the list wasn't exhaustive, and that Ministers could include other areas within the guidance.¹⁸

34. When we asked the Member why the guidance could not be set out in regulations. She told us that this had been considered, but that she felt the need for flexibility was essential:

“...it’s this constant battle to achieve flexibility, which allows the law to respond to situations in hospitals, in the profession, versus a statutory procedure that would be required to come back and back and back, which potentially could leave us in a situation where you had unsafe practices potentially going on in hospitals by virtue of needing a legislative process to come back....on balance, I think safety is best delivered by the flexibility of the guidance, rather than regulation.”¹⁹

Our view

35. As highlighted in paragraph 20, statutory guidance is the weakest legislative tool available to the Assembly. We believe that the Bill would be strengthened if the requirements were to be set out in regulations.

Recommendation 1: We recommend that the Member in charge tables amendments to the Bill to deliver the objectives of section 10A(4)-(6) of the National Health Service (Wales) Act 2006 through regulations subject to the negative procedure.

The use of definitions in the Bill

36. New section 10A(5)(d) of the 2006 Act requires the Welsh Ministers to define in guidance the terms used in section 10(1)(b) on the duty relating to nurse staffing ratios.

Evidence from the Minister

37. The Minister indicated that there are “some definitional matters here that would need to be explored and strengthened,”²⁰ adding that

¹⁸ CLA Committee, RoP [131] 2 February 2015

¹⁹ CLA Committee, RoP [135] 2 February 2015

²⁰ CLA Committee, RoP [10] 2 February 2015

there were “certain things...that would be better to be included on the face of the Bill” including “basic terms”.²¹ He highlighted that it is “very difficult to draw up guidance without knowing what we’re trying to achieve”.²²

38. Officials accompanying the Minister highlighted terms that they would like to see defined on the face of the Bill including “adult in-patient wards” and “acute hospitals”.²³ The Minister said that other than “registered nurse” they had not identified definitions in other parts of the statute book that could be used.²⁴

39. Additionally, they told us that the current definition of “health service body” includes the Welsh Ministers, which means the Welsh Ministers could be in a position of issuing guidance to themselves.²⁵

Evidence from the Member in charge

40. We explored these issues with the Member in charge, and she explained that because the Bill fits into the 2006 Act, a number of terms are defined there.²⁶

41. The Legal Adviser accompanying the Member in charge highlighted that amendments had been made following consultation on the Draft Bill, including changing references of “nurse” to “registered nurse”, because this was defined in the Interpretation Act 1978.

42. The Legal Adviser acknowledged that some terms such as “healthcare support worker” and “acute” were not defined on the face of the Bill because:

“...they are sector specific and have room for nuance and adjustment in the relation of the experience of that sector. Nursing levels will need to respond extremely quickly to changes and the best means of achieving that, we feel, is to

²¹ CLA Committee, RoP [27] 2 February 2015

²² CLA Committee, RoP [29] 2 February 2015

²³ CLA Committee, RoP [33] 2 February 2015

²⁴ CLA Committee, RoP [60-61] 2 February 2015

²⁵ CLA Committee, RoP [35] 2 February 2015

²⁶ CLA Committee, RoP [147] 2 February 2015

leave the definitions to be decided by Welsh Ministers on the basis of any expert advice they receive.”²⁷

43. Kirsty Williams AM concluded by stating that definitions did currently exist, outside of legislation, for some of these key terms, and that she was “open to the suggestion” if there was a call for some to be defined on the face of the Bill.²⁸

44. We also explored with the Member the possibility of the Welsh Ministers being in a position of issuing guidance to themselves. She told us that it was specifically written in that way, because under the National Health Service (Wales) Act 2006, Welsh Ministers have a duty to provide nursing services, and that LHBs and NHS Trusts are directed to exercise these functions on behalf of the Welsh Ministers. Therefore if there was a situation where these health bodies didn’t exist, the Welsh Ministers would be legally required to provide these services.²⁹

Our view

45. In general, terms are defined on the face of a Bill, and where it may be necessary to alter the definitions, a power will sometimes be included to amend the definition by regulations. Any such change is then subject to formal Assembly scrutiny. Definitions in guidance should be less prescriptive, and bodies will have to interpret the subsection themselves, as the definition is not in the legislation.

46. We think there is a need for some of the key terms to be defined either on the face of the Bill or in regulations.

Recommendation 2: We recommend that the Bill is strengthened by the Member in charge by placing more definitions on the face of the Bill.

Section 4 – Commencement

47. The Bill states that the Act will come into force on Royal Assent. It also states that it has effect in relation to each financial year of a health service body beginning on or after Royal Assent.

48. We sought clarity from Kirsty Williams AM, on the wording of this section. We were concerned that there was a possibility that it could be

²⁷ CLA Committee, RoP [148] 2 February 2015

²⁸ CLA Committee, RoP [151-152] 2 February 2015

²⁹ CLA Committee, RoP [157] 2 February 2015

misinterpreted as referring to a health service body beginning on or after Royal Assent rather than the financial year beginning on or after Royal Assent.

49. She confirmed that the Bill is intended to apply to all health service bodies in Wales, including the existing ones. Her legal advisor also confirmed that the Member's team did not "think there's any confusion in the terminology used in this section".³⁰

50. The Member agreed that this could have been made clearer within the Explanatory Memorandum, and that this would be "taken into consideration".³¹

Recommendation 3: We recommend that the Member in charge considers the clarity of this provision and brings forward amendments if necessary.

Our view

51. Currently the Bill states that the Act comes into force on Royal Assent. However, the Bill cannot come into force until the guidance has been issued. We therefore believe that the Bill should include a commencement power for the Minister.

Recommendation 4: We recommend that a commencement power is included in the Bill.

³⁰ CLA Committee, RoP [173] 2 February 2015

³¹ CLA Committee, RoP [175] 2 February 2015